

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
SCARSELLA BROTHERS, Inc., )  
Appellant, )  
v. )  
PUGET SOUND AIR POLLUTION )  
CONTROL AGENCY, )  
Respondent, )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Intervenor. )

PCHB No. 1083

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

PER W. A. GISSBERG:

This matter, the appeal of the denial of an application for a permit for open burning of wood waste material came on for formal hearing before the Pollution Control Hearings Board (Art Brown, Chairman, W. A. Gissberg and Chris Smith) convened in Seattle on November 29, 1976.

Appellant Scarsella Brothers, was represented by its attorney,

1 John D. Blankinship; respondent Puget Sound Air Pollution Control  
2 Agency appeared by, and through its attorney, Keith D. McGoffin;  
3 intervenor Washington State Department of Ecology appeared through its  
4 Assistant Attorney General, Robert V. Jensen.

5 Having heard the testimony and being fully advised, the Board  
6 makes and enters the following

7 FINDINGS OF FACT

8 I

9 Respondent, pursuant to RCW 43.21B.260, has filed with this Board a  
10 certified copy of its Regulation I containing respondent's regulations and  
11 amendments thereto.

12 II

13 Appellant was awarded a contract by the State of Washington for  
14 land clearing of over 70 acres of highway right-of-way and the disposal  
15 of the wood waste therefrom, estimated by appellant to be 500 tons.  
16 Its successful bid was for \$800.00 per acre.

17 III

18 Article 8, Section 8.07 of respondent's Regulation I provides in  
19 pertinent part:

20 It shall be unlawful for any person to cause or allow  
21 any outdoor fire for disposal of wood waste generated by:  
22 (1) Federal, state and county land clearing projects  
23 generating 500 or more tons of wood waste. . . .  
24 . . . unless the person proposing the outdoor burning  
25 has demonstrated to the Control Officer . . . that:  
26 . . . (11) The total cost of disposing of wood waste  
27 by means of a certified alternative is greater than that per  
28 acre cost specified by the Department of Ecology in WAC 18-12.

25 IV

26 The Department of Ecology had, August 1, 1975 by its admin-

27 FINAL FINDINGS OF FACT,  
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1 istrative Order, conditionally certified and approved the use of a  
2 Camran air curtain combustion unit. Although the purpose of the  
3 certification was in furtherance of WAC 18-12-110 and 18-12-075, there is  
4 no reference or mention of any "per acre cost" to be found in  
5 WAC 18-12 notwithstanding the statement to the contrary contained in  
6 respondent's Regulation I.<sup>1</sup> There is, however, in the order of  
7 certification of the device the following conditional language:

8 I . . . 4. The use of the air curtain combustion unit  
9 is reasonably economical for the types of projects [here involved]  
10 . . . when it can be provided without unreasonable delay  
11 to a project and subject to the following further conditions:  
12 (a) for projects . . . the total cost of disposing of  
wood waste by this means including any additional cost to the  
clearing and grubbing contractor is not greater than \$900.00  
per acre.

3 Appellant could, under the terms of the order of certification,  
14 dispose of the wood waste by conventional open burning by demonstrating  
15 that:

16 III . . . 2. The cost of disposing of wood waste by  
17 using a certified alternative will exceed applicable  
limitations of . . . [\$900 per acre].

18 V

19 Appellant obtained the bid of one Landmark Corporation which  
20 offered to rake the certified Camran device available for disposal of  
21 wood waste for a "total cost of \$900.00 per acre." However, the offer  
22 required that:

23 . . . the material should be prepared in a manner similar  
24 to that which would be required for an acceptable open burn  
with the larger stumps split. . . .

25  
26 1. Article 8, Section 8.07(2)(11).

27 FINAL FINDINGS OF FACT,  
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1 Since it would cost well over \$400 per acre to prepare the  
2 material for burning (clearing, grubbing, splitting and stacking)  
3 appellant certified, on respondent's form, that:

4 . . . The total cost of . . . disposal . . . using a  
5 Certified Alternative, is in excess of . . . (\$900.00)  
6 per acre.

7 and requested that respondent find and determine that appellant had  
8 demonstrated (as provided in WAC 18-12-110(2)(c)(11) that no certified  
9 alternate can be used within applicable cost limitations. Respondent  
10 refused to do so and advised appellant that it had

11 . . . not satisfied the requirements of Section 8.07 of  
12 Regulation I by demonstrating: The total cost of disposing  
13 of wood waste by means of a Certified Alternative is greater  
14 than that per acre cost specified by the Department of  
15 Ecology in WAC 18-02.

16 It is from that order that appellant appealed, asking that it be reversed  
17 and that respondent be ordered to grant appellant's application for a  
18 permit for open burning.

## 19 VI

20 The Landmark Corporation, apparently the only one authorized to  
21 sell the use of the Camran air curtain combustion unit, is not  
22 registered as a "contractor" under chapter 18.27 RCW. The Chief of  
23 the Contractor's Registration Section of the Department of Labor and  
24 Industries has advised the Landmark Corporation that it is "exempt  
25 under RCW 18.27.010" and hence is not required to register as a  
26 contractor because its function is that of disposing of wood materials  
27 that have already been prepared for disposal and would not engage in  
28 any activity that physically alters the real estate such as the  
29 "removal of stump, excavating or landscaping." (Ex. R-4).

30 FINAL FINDINGS OF FACT,  
31 CONCLUSIONS OF LAW AND ORDER

VII

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

The action of the respondent should be reversed and respondent should be ordered to grant appellant's application for a permit for open burning as otherwise provided by the agency's Regulations.

II

The respondent's Regulation, Article 8, Section 8.07, purports to make it unlawful for a person to cause an outdoor fire for disposal of wood waste generated by certain governmental land clearing projects unless that person has demonstrated that

. . . The total cost of disposing of wood waste by means of a certified alternative is greater than that per acre cost specified by the Department of Ecology in WAC 18-12.

That state regulation does not list or indicate the availability of any certified alternate nor does it in any way deal with, indicate, or specify the total per acre cost of disposing of wood waste.

Any regulation, the violation of which may subject one to criminal or civil penalties should not be vague. The respondent's Regulation is vague because neither it nor the Department of Ecology regulation to which it refers provide any dollar figure of per acre cost nor does either regulation make reference to any agency Order from which such vital information can be procured.

FINAL FINDINGS OF FACT,  
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1 III

2 Assuming, however, that a citizen's diligent search does lead  
3 him to the Department of Ecology Order which certified the Camran  
4 device, that Order is itself fraught with ambiguity and is susceptible  
5 of appellant's interpretation of it without straining to reach that  
6 result. The fact that extraneous testimony is needed to explain the  
7 background of the cost provisions of the Order leads us to conclude  
8 that it is also too vague. In short, either the agency or the Depart-  
9 ment of Ecology regulation should be rewritten.

10 IV

11 With respect to the Contractor Registration Statute, we believe  
12 that the Landmark Corporation falls within the purview of RCW 18.27.010  
13 defining a contractor as

14 . . . any . . . corporation . . . which, in the pursuit  
15 of an independent business undertakes to . . . construct  
16 . . . for another, any . . . highway . . . .

16 However, that corporation appears to be exempt because of RCW  
17 18.27.090 which provides that:

18 This chapter shall not apply to: . . . (6) Any . . . alteration  
19 of . . . personal property.<sup>2</sup>

20 In Brerreyer the contractor was one clearing standing timber, while  
21 in the instant case the contractor is one disposing of personal property  
22 (pulled stumps).

23 V

24 Any Finding of Fact which should be deemed a Conclusion of Law  
25 is hereby adopted as such.

26 Therefore, the Pollution Control Hearings Board issues this

27  
2. See Brerreyer v. Peter Kiewit, 16 Wn. App. 318 (1976).

ORDER

This matter is reversed and remanded to respondent for its action on appellant's application for a permit for open burning.

DATED this 20<sup>th</sup> day of December, 1976.

POLLUTION CONTROL HEARINGS BOARD

Art Brown

ART BROWN, Chairman

W. A. Gissberg

W. A. GISSBERG, Member

See concurring opinion

CHRIS SMITH, Member

FINAL

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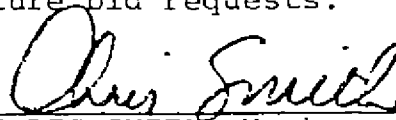
1 Smith, Chris--I concur with the Order, based on Conclusions of  
2 Law II and III, but disagree with Finding of Fact V, lines 1 and 2  
3 (page 4). I would delete lines 1 through 3, substituting:

4 Appellant testified that \$500 of his \$800 per acre bid  
5 represented the cost of clearing, grubbing, and stacking  
6 (not including stump splitting). Landmark's bid for  
waste disposal using the Camran equipment was \$900 per acre.  
Appellant certified, on respondent's form, that:

7 I would also add the following Conclusion of Law:

8 Landmark's bid meets the test of economic reasonableness,  
9 with the exception of its bid requirement for stump splitting,  
not normally a part of the clearing and grubbing procedure.

10 Obviously, appellant's bid price is far from sufficient  
11 to meet the requirement for use of a certified alternative.  
12 It is not clear whether he was aware of such a potential  
13 requirement when he responded to the Highway Department  
bid request; if such notification was lacking, the Board  
urges its inclusion in all future bid requests.

14   
CHRIS SMITH, Member